STATEMENT OF
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Public Hearing on
Federal Sentencing Options After *Booker*
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Thank you, Judge Saris and Commissioners, for inviting me to testify on behalf of FAMM as a member of the Community Perspectives panel. We have come before the Commission every year for more than 20 years, often to testify at hearings like this, to urge you to do what you can to cure the severity that is a hallmark of many guideline rules. What you do matters a great deal to the tens of thousands of people sentenced every year under the guidelines. We welcome any opportunity to share our perspective and urge you to improve sentencing.

You charged us to compare two sets of options. The first proposal – is anchored by your unprecedented request to Congress to stage what amounts to a legislative intervention, due to your concern about an increase in the number of variances and what you have characterized as "troubling trends in sentencing. . . ." The other set of options are those that would, as you put it, "restore mandatory guidelines." The request to compare the options assumes there is some need for them. I do not share that assumption.

Both sets of options would inflict harm on, rather than improve, the administration of justice. Both would endanger and even end the healthiest and most honest dynamic the guideline system has ever experienced – that of the unfolding dialogue between the judiciary speaking through its sentencing decisions to the Commission and the Commission responding by evaluating the judicial feedback and determining if and how it might do a better job of guiding the conversation. It would be the equivalent of telling one participant in that conversation: we don't like what we are hearing, and we don't want to hear any more.

In addition, we think that any effort to make the sentencing guidelines mandatory or more binding on sentencing judges rests on flawed premises, missing information, unduly rigid interpretations of the role of the guidelines in sentencing, and the failure to recognize – or at least help Congress recognize – the difference between disparity that is warranted and that which is not.

The Commission announced in its priorities for the current cycle that it would be publishing a comprehensive report on the state of federal sentencing since the *Booker* decision.[1] The Department of Justice, expressing concerns about variances and disparity in sentencing, requested such a study in 2010. In its letter, it urged "the Commission to explore new ways of analyzing federal sentencing data in order to understand federal sentencing outcomes better, identify any unwarranted sentencing disparities, and determine whether the purposes of sentencing are being met."[2]

But, in October, without waiting to complete the *Booker* report, the Commission went to Congress with its request to alter the rules of sentencing, based on concerns about variances and disparity.[3] We don't know if that means the report is complete and the Commission has in fact conducted the thorough inquiry the Department sought, but we do know the information provided in the congressional testimony leaves us with a lot of questions about evidence supporting the need for any *Booker* fix.

The testimony to Congress evinced a troubling lack of curiosity on the Commission's part about the causes of variances and the sources of disparity. For example, the testimony presented Congress with raw data that showed "an increase in the numbers of variances from the guidelines in the wake of the Supreme Court's recent jurisprudence,"[4] and demonstrated "troubling trends in sentencing, including growing disparities among districts and circuits."[5] The Commission did not, with a couple of tantalizing exceptions, analyze the possible causes of variances and disparities. Such analysis likely would shed light on underlying problems and point to potential solutions, if any are needed.

When the submission to Congress offered some analysis, for example providing very useful information that lower sentences are due not only to judicial variances but also to "a reduction in the overall severity of the aggregate offenses in the federal caseload (i.e., due to the increasing portion of the federal caseload involving immigration cases, which carry lower sentences, on average, than other offenses),"[6] that insight never found a home in the overall narrative. The Commission did not appear to draw any conclusions from that bit of information. That left us to ask, how does it affect the Commission's view of the problem to know that some

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[1] U.S. SENT'G COMM'N, NOTICE OF FINAL PRIORITIES 3 (2011), *available at* http://www.ussc.gov/Legal/Federal_Register_Notices/20110915_FR_Final_Priorities.pdf.
[2] Letter from Jonathan Wroblewski to The Honorable William K. Sessions III 3 (June 28, 2010) (hereinafter "Wroblewski Letter").
[3] Testimony of Patti B. Saris, Chair, United States Sentencing Commission before the Subcomm. on Crime, Terrorism, and Homeland Security, Comm. on the Judiciary of the U.S. House of Representatives (Oct. 12, 2011) (hereinafter "Saris Testimony"), *available at* http://judiciary.house.gov/hearings/pdf/Saris%2010122011.pdf.
[4] Saris Testimony at 1.
[5] *Id.*
[6] *Id.* at 22.

variances are the direct result of a changing federal caseload and different prosecutorial emphases?

Similarly, the Commission reported to Congress that the guideline rule that invites the greatest number of departures is the criminal history guideline, but that appears to have been the end of that inquiry.[7] But can't the Commission help stakeholders better understand why judges believe the criminal history guideline so frequently fails to account appropriately for the defendant's actual prior criminality? Is there something about the criminal history guideline that is askew?

In the same section, the Commission told Congress that variances are most frequently triggered by "the nature and circumstances of the offense."[8] But we are left to wonder, what does that mean and how does it fit into the case that is being built for a legislative fix?

We think that posing those questions to the panels and roundtables today would have been a much more satisfying and productive inquiry than one that asks how best to ensure judges don't sentence below the guidelines so often.

There is a world of insight behind the unadorned numbers and pieces of data. You can help reveal it.

So, we urge the Commission, in preparing the *Booker* study, to take a hard look behind the numbers to help us understand what they can teach us, besides the fact that judges vary and there is disparity in the system.

The Commission might, for example, take a page from the American Bar Association to tease out what is at work here.[9] James Felman, testifying before Congress for the ABA, went behind the numbers and factored out sentences under two guidelines that are resulting in lower sentences due to changes made by the government and the Commission: illegal reentry and crack cocaine sentences.

When he did, he found that sentences are not lower for all the other categories; rather, they are higher.[10] That is, when he isolated the lower sentences for illegal reentry cases (lower due to the government's policy of prosecuting less serious cases) and crack cocaine offenders

[7] *Id.* at 24.
[8] *Id*.
[9] Testimony of James E. Felman on behalf of the American Bar Ass'n. before the Subcomm. on Crime, Terrorism and Homeland Security, Comm. on the Judiciary (Oct. 12, 2011) (hereinafter "Felman Testimony"), *available at* http://judiciary.house.gov/hearings/pdf/Felman%2010112011.pdf.
[10] *Id*. at 5-6.

(whose sentences have dropped 30 months due to Commission and congressional steps to lower sentences), "average sentences for all other major categories of offenses are either unchanged or slightly higher today under advisory guidelines,"[11] with two exceptions. They are significantly higher for economic crime and child pornography offenses. Sentences for economic crimes increased 34 months, from 89 months in 2006 to 123 months in 2010.[12] Meanwhile, child pornography sentences increased 44 months in the same period of time.[13] It is not wonder that those guidelines generate such widespread variances that the Department of Justice recommended that "the Commission should conduct a review of – and consider amendments to – those guidelines that have lost the backing of a large part of the judiciary. Those reviews should begin with the guidelines for child pornography possession offenses and fraud offenses."[14]

Unusually harsh guidelines are not the entire story. Better accounting for the role of prosecutors in variances and disparity means that lawmakers will have more information to evaluate when deciding whether to upset the current balance of judicial discretion. Alterations to the guideline system that put more power in the hands of prosecutors by tying those of judges strike us as both counterintuitive and counterproductive

Prosecutors play a huge role in sentencing outcomes that vary from district to district by selecting which cases to prosecute and which charges to bring. They also affect outcomes by recommending sentences that vary from the guidelines, or by not objecting to – and not appealing – below-guideline sentences. Government actions exert a strong gravitational pull on sentences and sentencing practices. But much of their impact cannot be assessed because much of what prosecutors do takes place behind closed doors. Prosecutors' nod-and-wink acquiescence in below-guideline sentences is buried in sentencing transcripts, but shows up in statistics looking like judge-caused disparity. When judges vary or depart, they say why, on the record. Prosecutors need not do so, though their impact on final outcomes is at least as significant as that of judges. It is not only the judge you draw; it is also the prosecutor you draw.

But there is nonetheless a lot to learn. No two federal districts are alike, and prosecutors treat their different caseloads differently. The Commission could make an important contribution to our understanding of inter-district disparity by examining not only judicial actions but those of prosecutors as well. Prosecutors generate inter-district disparity in how, where, and how often they seek below-guideline sentences. For example, as Commission statistics demonstrate, in 2010, the government asked courts to impose below guideline sentences in over 60 percent of cases they prosecuted in the Southern District of California but in only 3.7

[11] *Id*. at 6.
[12] *Id*. 5-6.
[13] *Id*. at 6.
[14] Wroblewski Letter at 3.

percent of cases in the District of South Dakota, a difference of 56.7 percent.[15] It would be very useful to know why, or at least to get an understanding of what makes the caseloads and practices in southern California and South Dakota so very different. Given that the Department has requested the Commission "explore new ways of analyzing federal sentencing data"[16] they might be willing to share their insights and information prosecutorial approaches that differ from district to district.

As you know, until very recently[17] the Attorney General decided in which districts prosecutors could ask the judge to impose below-guideline sentences in certain immigration cases. The Attorney General authorized such "fast track" disposition in some, but not all, districts. Therefore, illegal immigration cases in the other districts did not get the benefit of a government recommendation. So, the Department's early disposition policy produced built-in sentencing disparity among similarly situated defendants. Their only difference? It wasn't one based on any goal of sentencing. The only difference between one similarly situated illegal reentry defendant and another was the district in which they were prosecuted and whether the Attorney General had authorized a lower sentence. It is no surprise that some courts combated this disparity among otherwise similarly situated defendants by varying from the guidelines in those districts the Attorney General had not elected to permit the early disposition departures.

This is important information about some judicial variances that the Commission can help develop. Practitioners have discussed this very issue with the Commission on many occasions over the years. One notable, but by no means the only, example is the testimony of Alex Bunin, from nearly three years ago.[18] He appeared on behalf of the Federal Public Defenders at the regional hearing held in New York. He carefully unpacked, district by district (for those regions the hearing was addressing, the First, Second, Third and Fourth), how the government's rules and practices affected sentence lengths and disparity.

He explained, for example, that the District of Massachusetts at the time had no fast-track authority but had an increase in illegal reentry cases. Judges found the guideline range to be unwarrantedly excessive in nearly 30 percent of those cases.[19] Similarly, in Rhode Island, federal judges found the illegal reentry guideline excessive in 23.1 percent of cases.[20] The judges in the Southern District of New York also worked to correct the disparity, varying below

[15] U.S. SENT'G COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS App. B, 188, 252 (hereinafter "2010 Sourcebook").
[16] Wroblewski Letter at 3.
[17] Memorandum from James Cole to All United States Attorneys (Jan. 31, 2012).
[18] Written Statement of Alexander Bunin, Public Hearing before the U.S. Sentencing Commission, New York City, New York at 18–19 (July 9, 2009) (hereinafter "Bunin Statement").
[19] Bunin Statement at 7.
[20] *Id*. at 8.

the guideline range in 39.8 percent of the cases.[21] If no one knew better, it looked like judges were giving those illegal reentry defendants a big, unwarranted break. But Mr. Bunin's work helped us appreciate that judges were not the cause of unwarranted disparity, they were combatting unwarranted disparity.

In another example, three Federal Public Defenders recently sent a letter to Assistant Attorney General Lanny Breuer responding to his remarks at the American Lawyer/National Law Journal Summit. Mr. Breuer had used raw statistics from the Commission to draw variance comparisons between, on the one hand, the Southern and Western Districts of Texas and, on the other, the Southern District of New York.[22] The Defenders' letter responded to his charge that "the length of a defendant's sentence depends primarily on the identity of the judge assigned to the case, and the district in which he or she is [sentenced]"[23] The federal defenders presented, as they frequently do in their submissions to the Commission, a compelling, data-driven case – relying on publicly available Sentencing Commission data – for their persuasive conclusion that "these disparities have far more to do with the types of cases that arise in each district, and the prosecutions' policies that local federal prosecutors have chosen to address."[24]

In each case, the analysis was revealing for its birds-eye view of the causes and impacts of structural and government-led disparity in sentencing. Such helpful and in-depth analysis enriches our understanding of sentencing and helps lay the foundation for good sentencing policy.

The Commission would do a great service to emulate an approach that never takes the numbers at face value as it prepares to release its upcoming *Booker* report.

We are also concerned that the Commission appealed to Congress to fix the guidelines without first using the tools and authorities at hand to improve troublesome sentencing rules. Congress built in the means to revisit and perfect sentencing guidelines in 28 U.S.C. § 994(o).

Seeking a change to discretion without trying to fix problematic guidelines suggests that the guidelines are infallible. Were that true, then indeed variance from the guidelines should be better controlled. But the guidelines are not perfect, and not because they are now advisory. They are deeply flawed because they are and have been rife with sentences that are unduly long, overly retributive, not proportionate, and based on little or no empirical evidence of their inherent validity.

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[21] *Id.*
[22] Letter from David E. Patton, et al. to Lanny A. Breuer 1 (Nov. 22, 2011) (quoting Breuer speech) (hereinafter "Patton Letter"), *available at:* http://www.fd.org/pdf_lib/Letter%20to%20Lanny%20Breuer.pdf
[23] Patton Letter at 1.
[24] *Id.*

We encourage you to embrace the feedback you are receiving from judges.

The Commission can help Congress recognize that sentences that vary widely from particular guidelines, and the fact that such sentences exist, might contain important information about the appropriateness of a given guideline. As the Supreme Court said in *Rita*, when judges sentence outside the guideline range based upon the considerations laid out in 18 U.S.C. § 3553(a), the information is relevant to the constructive evolution of the system.[25] Understood in that light, complaints about judicial departures or variances from the calculated guidelines miss the point – and not paying attention to them misses an opportunity.

Increasing variances from the guidelines are among the reasons cited by the Commission for its request that Congress intervene and fix some of the rules about sentencing.[26] But if the problem lies in the guidelines and not in judicial discretion, isn't the better course to consider fixing the guidelines rather than trying to stop judges from doing what they can do to ameliorate unjust sentences? Taken in that light, judicial variances are a barometer, not a problem.

Take, for example, criminal history. Criminal history is the most frequently cited reason for departure from the guidelines. This means that judges do not find the guideline helpful in evaluating the seriousness or predictive value of a defendant's criminal history. In 2010, 43.8 percent of all departures below the calculated guideline were due to criminal history calculations overstating the seriousness of the defendant's actual criminal history.[27] That guideline could use some fixing.

Judicial feedback was essential to the battle to fix the crack cocaine guideline, as Amy Baron-Evans and Kate Stith describe it in *Booker Rules*.[28] Judges had no ability to depart from the crack cocaine guideline before *Booker* because of the Catch-22 quandary present at the intersection of a bad guideline and unduly restrictive departure rules. Everyone knew the crack cocaine guideline resulted in extreme racial disparity in sentencing. But judges could not depart from the guideline on that ground because the extreme racial disparity, which was the inevitable result of abiding by the guideline, was not atypical. Once able to vary, judges were free to ameliorate the racial disparity caused by the 100-to-one ratio. The rest of course is history.

While the crack guideline was the poster child of bad guidelines, there are many more that judges and practitioners have identified as needing attention. For example, we and others

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25. *Rita v. United States*, 551 U.S. 338, 358 (2007).
[26] Saris Testimony at 1.
[27] 2010 Sourcebook at 67.
[28] Amy Baron-Evans & Kate Stith, *Booker Rules* 27-28 (Jan. 16, 2012), U. Pa. L. Rev., forthcoming, *available at* http://ssrn.com/abstract=1987041/.

have been urging the Commission for years to delink or at a minimum rejigger the relationship between the statutory mandatory minimums and corresponding guideline ranges. Advocates and practitioners have asked the Commission over and over again to change the relevant conduct rules that require judges to include even acquitted conduct in the sentencing equation. We and others have argued for a better guideline safety valve, a retooled criminal history guideline, better fraud and loss rules, and new looks at the career offender guideline and those that govern child pornography. Why? Because they result in disproportionate, unduly harsh sentences.

Unfortunately, absent meaningful feedback from judges, given the crabbed departure standard, and pressure from Congress and the Administration, nearly all of the 737 guideline amendments promulgated through 2009 increased the severity of sentences or hindered judicial discretion.[29]

It does not have to continue to be that way. We urge you to take steps now to improve problematic guidelines, especially those judges highlight by repeatedly varying from them, and those advocates and practitioners have assailed for years.

In conclusion, we encourage you to dig down and refuse to take the data at face value. Embrace feedback, take stock of guidelines that are causing variances, account for the role of other actors and rules in the system that might be driving disparity, and above all, don't do anything that will slow down or close down your ability to hear what the courts think about the rules you write.

Thank you for considering our views.

[29] *Id.* at 21.